

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

COMMUNICATIONS GATEWAY NETWORK, INC.)
a/k/a WINSTAR GATEWAY NETWORK, INC. AND)
WINSTAR COMMUNICATIONS, INC.)
)
)
)

CASE NO. 96-181

ALLEGED VIOLATIONS OF KRS 278.020(4) AND)
(5), KRS 278.030, KRS 278.260, AND)
COMMISSION REGULATION 807 KAR 5:011,)
SECTION 3)

O R D E R

On January 15, 1993, the Commission granted Communications Gateway Network, Inc. ("Communications Gateway") the authority to provide intrastate long-distance telecommunications service as a reseller within the Commonwealth of Kentucky.¹ In 1996, the Commission received notice of Communications Gateway's name change to WinStar Gateway Network, Inc. ("WinStar Gateway"). The Commission also received from WinStar Gateway the revised tariff of Communications Gateway, which did not comply with the requirements of Commission Regulation 807 KAR 5:011.

In January of 1996, Commission Staff received several informal complaints against WinStar Gateway. The complaints arose primarily from WinStar Gateway's marketing agents' use of display box programs, which typically advertised a contest to win a car or a vacation, to solicit letters of agency ("LOAs") authorizing primary

¹ Case No. 92-426, Communications Gateway Network, Inc. Application for Authorization to Provide Intrastate Telecommunications Resale Services.

interexchange carrier ("PIC") changes to WinStar Gateway. Most of the complainants alleged that their long-distance telephone service had been switched from their carrier of choice to WinStar Gateway without appropriate customer authorization, an unreasonable act commonly referred to as "slamming." Consequently, Commission Staff, on January 2, 1996, opened an informal investigation into WinStar Gateway's practices, pursuant to KRS 278.260(1).

On April 25, 1996, the Commission received WinStar Gateway's application notifying the Commission of the 1993 acquisition by WinStar Communications, Inc. ("WinStar Communications") of controlling interest in Communications Gateway.² WinStar Gateway states that WinStar Communications acquired control of Communications Gateway by exercising an option that it purchased approximately one year before Communications Gateway was granted authority to operate in Kentucky. WinStar Gateway seeks Commission approval of the transfer of control and name change.

WinStar Gateway states that the transfer of control did not and has not caused any harm to Communications Gateway's/WinStar Gateway's customers. It asserts that there has been no change in the quality of service provided to the customers and that the rates charged for such services were not affected by the transaction. WinStar Gateway further states that, with the exception of the name change, the transfer of

² WinStar Communications, a Delaware corporation, is a publicly-traded company whose stock is traded over the NASDAQ's national market system. Through its various operating affiliates, WinStar Communications specializes in the development and provision of telecommunications services throughout the United States.

control was totally transparent to the customers and in no way created confusion or inconvenience.

Finally, WinStar Gateway states that the transfer has enabled it to realize operational and management efficiencies, to provide strong financial support, and to realize other corporate benefits that have inured to the benefit of its subscribers.

Notwithstanding the above, WinStar Communications and WinStar Gateway were required to obtain Commission approval prior to the transfer.³ KRS 278.020(4) states, inter alia, that:

No person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission . . . without prior approval by the commission.
[Emphasis added.]

KRS 278.020(5) states that no one shall acquire control, either directly or indirectly, of any utility furnishing service in Kentucky without prior Commission approval.

Because a prima facie case had been established that Communications Gateway/WinStar Gateway had violated Commission rules and regulations, the Commission entered an Order on October 28, 1996 requiring Communications Gateway/WinStar Gateway and WinStar Communications to appear at a hearing to show cause why penalties pursuant to KRS 278.990 should not be imposed for the parties'

³ In Administrative Case No. 359, Exemptions for Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned, Coin-Operated Telephones, Order dated June 21, 1996, and effective August 1, 1996, the Commission exempted long-distance telecommunication carriers from the statutory requirement that transfers receive prior Commission approval. However, the transaction at issue here predates Administrative Case No. 359 by approximately three years.

failure: (1) to obtain the Commission's prior approval for the transfer of control of Communications Gateway--an alleged violation of KRS 278.020(4) and (5); (2) to obtain appropriate customer authorization prior to switching complainants' long-distance telephone service from their carrier of choice to WinStar Gateway--an alleged violation of KRS 278.030 and KRS 278.260(1); and (3) to file properly its tariff--an alleged violation of Commission Regulation 807 KAR 5:011, Section 3.

Due to the nature of the allegations made against WinStar Communications and the other issues raised in this proceeding, the Commission also ordered that the application of WinStar Wireless of Kentucky, Inc. ("WinStar Wireless"), another affiliate of WinStar Communications, seeking authority to provide telecommunications services in Kentucky, be held in abeyance pending resolution of all issues raised in this case. WinStar Wireless' application is docketed as Case No. 96-249.⁴

On November 15, 1996, WinStar Gateway and WinStar Communications filed a joint motion seeking an informal conference in lieu of a hearing and on November 27, 1996, Communications Gateway/WinStar Gateway filed a document entitled Verified Statement of Art Greene, President of WinStar Gateway Network, Inc. ("Verified Statement"). On December 13, 1996, the Commission granted the parties' motion and the hearing was continued generally.

⁴ Case No. 96-249, The Application of WinStar Wireless of Kentucky, Inc. for a Certificate of Public Convenience and Necessity to Provide InterLATA and IntraLATA Private Line Services Throughout the State of Kentucky.

In its Verified Statement, WinStar Gateway states that it has taken corrective actions to address the concerns raised in the Commission's Show Cause Order. It states that:

(1) WinStar Gateway's files now contain all documentation relevant to its operations in Kentucky and other states.

(2) WinStar Communications management has increased its level of oversight to ensure regulatory compliance, including the imposition of regular internal reporting requirements.

(3) It has prepared and published, in conformance with 807 KAR 5:011, its tariff, which includes a chart providing a comparison with Communications Gateway's tariffs.

(4) It no longer processes LOAs submitted from display box programs absent independent verification that the consumer who signed the LOA was the telephone subscriber for the phone number listed and that he or she desired to change to WinStar Gateway's long-distance service.

(5) It has not and will not accept any LOAs from any of its marketing agents' current or previous display box programs, which it directed the agents to remove, that are dated after June 10, 1996.

(6) It plans to direct future marketing predominantly to business, rather than residential, consumers.

(7) It has substantially increased its staffing to handle consumer complaints resulting from the display box program LOAs.

(8) Its Customer Satisfaction Department is now open 24 hours a day, seven days a week.

(9) It has upgraded its system and hired additional employees to expedite responses to consumer inquiries.

Moreover, WinStar Gateway states that when a consumer complained about a PIC-change, it re-rated the consumer's invoice (to the extent that it would have been lower), refunded the PIC-change charge and advised the consumer how to immediately change back to his or her previous long-distance carrier.

To protect against slamming, WinStar Gateway states that it presently has all LOAs that it receives from anyone, other than directly from the telephone subscriber, telephonically verified by an independent third party. Absent third-party verification that the subscriber signed the LOA and understood what he or she was authorizing and the ramifications thereof, such LOAs, WinStar Gateway states, are not processed for PIC change.

Finally, WinStar Gateway states that it requires, by written LOA, the subscriber's affirmative confirmation of any authorizations for PIC changes that may be obtained through telemarketing. It further states that it is in the process of implementing a system whereby subscribers who authorize PIC changes in response to telemarketing will be immediately transferred by the telemarketer to a third-party verification organization so that the subscriber's authorization may be duly verified by recordation of the information required under 807 KAR 5:062, Section 2(1).

WinStar Gateway has provided, as Exhibit E to the Verified Statement, a copy of its revised LOA, which complies with the requirements of 807 KAR 5:062. It states that it is not currently conducting marketing or submitting PIC changes in areas of Kentucky where a two-PIC system is in place. However, WinStar Gateway states that it is developing an LOA for purposes of that eventuality which will clearly state whether the consumer has authorized an intraLATA PIC change or an interLATA PIC change, or both.

WinStar Gateway has also provided, as Exhibit B to its Verified Statement, its Kentucky Complainant Information--Complaint Resolution Chart. The chart includes amounts that WinStar Gateway has paid to complainants to make them whole.

On January 10, 1997, WinStar Gateway and WinStar Communications filed with the Commission a document entitled Supplemental Submission of WinStar Gateway Network, Inc. and WinStar Communications, Inc. ("Supplemental Submission") which includes a copy of a consent decree between the Federal Communications Commission ("FCC") and WinStar Gateway. In the Supplemental Submission, the parties state that the decree is "the product of WGN's [WinStar Gateway's] voluntary approach to the FCC in June of 1996 to develop a comprehensive and uniform national approach to provide recompense to consumers who may have suffered confusion or harm from the acts of independent marketers who solicited letters of agency for WGN's long distance service using display box programs that advertised a contest."

On January 21, 1997, an informal conference was held at the Commission's offices. During the conference, Commission Staff requested additional information

concerning the status of the complaints. The additional information was filed on February 4, 1997. On that date, WinStar Gateway also filed a letter stating that it desires to resolve all issues presented in this matter by making a voluntary payment to the Kentucky State Treasurer.

On June 13, 1997, WinStar Gateway filed its letter offering to settle this matter by making a voluntary payment of Ten Thousand Five Hundred Dollars (\$10,500). In that letter, WinStar Gateway also notified the Commission that, "[i]n accordance with the FCC Consent Decree, WGN [WinStar Gateway] has this year issued to non-complaining Kentucky consumers credits, refund checks and debit cards equal to the total amount of \$74,638.00."

The Commission, having reviewed the evidence of record and being otherwise sufficiently advised, finds that the substantive, if not the procedural, requirements of KRS 278.020(4) are met. WinStar Communications and WinStar Gateway have the financial, technical, and managerial abilities to provide reasonable service in Kentucky. The Commission further finds that, except for the legal infirmity caused by the failure to obtain the Commission's prior approval, the transfer of control of Communications Gateway was made "in accordance with law, for a proper purpose and [was] consistent with the public interest." KRS 278.020(5). The transfer of control should therefore be approved. WinStar Gateway's proposed tariff, which was filed on July 8, 1996 under Communications Gateway's name, should also be approved with certain modifications.

The Commission further finds that WinStar Gateway has resolved the complaints that are the subject of this proceeding and is now in full compliance with all Commission

rules and regulations. Moreover, WinStar Gateway acknowledges its duty to comply with all statutory and regulatory obligations that are imposed upon it. WinStar Gateway's settlement offer should be accepted as a reasonable resolution of this matter. WinStar Gateway should, however, minimize the likelihood of future complaints and problems with its display box programs by providing the Commission with written notice of its intent to use a display box program for marketing in Kentucky.

IT IS THEREFORE ORDERED that:

1. The transfer of control of Communications Gateway to WinStar Communications is hereby approved.

2. WinStar Gateway shall file, within 10 days of the date of this Order, an adoption notice pursuant to 807 KAR 5:011, Section 11.

3. Within 10 days of the date of this Order, WinStar Gateway shall file in its own name the tariff of Communications Gateway with the following modifications, or such other tariff as it proposes to put into effect in lieu thereof:

a. Section 2.6.2 A(2) should be rewritten pursuant to 807 KAR 5:006, Section 14(1).

b. Section 2.7.3 should be rewritten pursuant to 807 KAR 5:006, Sections 8(h) and 8(2) which states that special charges shall be uniformly applied.

c. Section 2.11 should be rewritten pursuant to 807 KAR 5:006, Section 7.

4. If WinStar Gateway decides to use display box programs for marketing in Kentucky, it shall, prior to distributing a display box in this state, file with the Commission its notice of intent to do so. The notice shall describe in detail said program.

5. WinStar Gateway's settlement offer is hereby accepted.

6. Within 10 days of the date of this Order, WinStar Gateway shall pay to the Commonwealth of Kentucky the sum of Ten Thousand Five Hundred Dollars (\$10,500). This payment shall be in the form of a cashier's or certified check made payable to "Treasurer, Commonwealth of Kentucky" and shall be mailed or delivered to: Office of General Counsel, Public Service Commission, 730 Schenkel Lane, Post Office Box 615, Frankfort, Kentucky 40602.

7. Case No. 96-249 is no longer held in abeyance.

Done at Frankfort, Kentucky, this 2nd day of July, 1997.

PUBLIC SERVICE COMMISSION

Linda K. Breathitt
Chairman

Ed J. Webb
Vice Chairman

B. J. Helton
Commissioner

ATTEST:

Don Mills
Executive Director